TEH CHWEE HOCK & ANOR

v.

KHOR LEE PHAIK

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24(31)-381-78]
18 AUGUST 1997

CIVIL PROCEDURE: *Pleadings - Striking out defence - Rules of the High Court 1980, O. 18 r. 19(1)(b)-(d) - Whether a plain and obvious case for striking out - Onus - Upon whom - Grounds for striking out - Whether proved - Defendant's denial of plaintiffs' beneficial interest - Whether unreasonable - Whether disputed fact could be tried on affidavits - Whether defence could only be framed as a denial in view of plaintiffs' assertion of beneficial interest*

The plaintiffs applied to strike out the defence by virtue of O. 18 r. 19(1)(b)-(d) of the Rules of the High Court 1980. In their statement of claim, the plaintiffs had claimed that they were beneficiaries of the estate of one Lee Gaik Han (deceased) whilst the defendant had refuted the said claim.

Held:

[1] The onus was on the plaintiffs, as the applicants, to satisfy the court that this was a plain and obvious case for the striking out of the defence. The plaintiffs claimed a beneficial interest in the estate concerned whilst the defendant refuted the plaintiffs' claim. How that defence was scandalous, frivolous or vexatious, or might prejudice, embarrass or delay the fair trial of the action, or how that defence was an abuse of the process of the court were not spelt out or canvassed by the plaintiff.

[2] All that the plaintiffs canvassed were that they were beneficiaries of the estate concerned and that the defence, a denial of their beneficial interest, was not a reasonable defence. The striking out application was made on grounds (b) – (d) and not on ground (a). Nonetheless, even if the striking out application was made on ground (a) and even if affidavit evidence was admissible, which it was not, it still remained that a disputed fact could not be tried on affidavits.

[3] The defence was not a mere denial as the defendant disputing that the plaintiffs were beneficiaries of the estate concerned could only frame her defence, accordingly, as a denial. That defence was certainly not

unarguable and unreasonable as the plaintiffs had not exhibited any independent evidence to substantiate their claim, rather, the documents that the plaintiffs exhibited so far suggested otherwise. This was definitely not a proper case, not even remotely so, for the striking out of the defence.

[Application dismissed.]

Cases referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 ***(refd)***
Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co, [1892] 3 CH 277 ***(refd)***
Bagot v. Easton [1877] 7 Ch D 1 ***(refd)***
Bandar Builder Sdn Bhd & Ors v. UMBC [1993] 4 CLJ 7 ***(refd)***
Berdan v. Greenwood [1878] 3 Ex D 251 ***(refd)***
Blake v. Albion Assurance Society [1876] 45 LJCP 663 ***(refd)***
British and Colonial Association v. Foster [1887] 4 TLR 574 ***(refd)***
Castro v. Murray [1875] 10 Ex 213 ***(refd)***
Christie v. Christie [1873] LR 8 Ch 499 ***(refd)***
Davy v. Garrett [1878] 7 Ch D 473 ***(refd)***
Flemingo v. Dollar [1889] 23 QBD 388 ***(refd)***
Knowles v. Roberts [1888] 38 Ch D 263 ***(refd)***
London Corp v. Horner [1914] 111 LT 512 ***(refd)***
Millington v. Loring [1881] 6 QBD 190 ***(refd)***
Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib [1993] 1 CLJ 264 ***(refd)***
Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor [1994] 2 CLJ 249 ***(refd)***
Public Finance Bhd v. S Ramasamy [1990] 2 CLJ 431 ***(refd)***
Rassam v. Budge [1893] 1 QB 571 ***(refd)***
Re Morgan [1904] 35 Ch D 492 ***(refd)***
Rock v. Pursell [1887] 84 LTJ 45 ***(refd)***
Turquand v. Fearon [1879] 40 LT 543 ***(refd)***
United Telephone Co Ltd v. Tasker [1888] 59 LT 852 ***(refd)***
Willoughby v. Eckstein [1936] 1 All ER 650 ***(refd)***
Young v. Holloway [1895] P 87 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(b)-(d)

For the plaintiffs - Chua Leng Poh; M/s Khor Anuar & Khong
For the defendant - Rumi Manecksha; M/s Ong & Manecksha

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

This is the plaintiffs' application dated 23 April 1997 to strike out the defence dated 28 December 1996, on the grounds set out in O. 18 r. 19(1) (b - d) of the Rules of the High Court 1980.

The plaintiffs' statement of claim dated 13 December 1996 may be paraphrased as follows.

The 1st plaintiff is the child of Lee Gaik Han (deceased) and the grandchild of Teoh Ee Tam (deceased). The 2nd plaintiff is the child of Teh Teow Yeang (deceased), the husband of Lee Gaik Han (deceased). Both plaintiffs are beneficiaries of the estate of Teoh Ee Tam (deceased). Teoh Ee Tam (deceased) was the registered owner of a piece of land known as Lot 437(1) Tanah Pegangan 907 Mukim 19, Seberang Perai Tengah (hereinafter referred as the said land).

Teoh Ee Tam died on 10 October 1918. In 1963, letters of administration to the estate of Teoh Ee Tam (deceased) was granted to Lee Chin Boh (deceased). The defendant is a representative of the estate of Lee Chin Boh (deceased). In his petition for the said letters of administration, Lee Chin Boh admitted that Lee Gaik Han was a daughter of Teoh Ee Tam (deceased). Accordingly, Lee Gaik Han (deceased) had a beneficial interest in the said land, and the plaintiffs, as Lee Gaik Han's children and the beneficiaries of her estate, in turn, have a beneficial interest in the said land.

Lee Chin Boh (deceased) transferred the said land unto himself by fraudulent and wrongful means: Lee Chin Boh (deceased) (i) distributed the said land unto himself as the sole beneficiary, (ii) falsely affirmed, whereas he knew that Lee Gaik Han (deceased) was also a beneficiary of the estate of Teoh Ee Tam (deceased) and that Lee Gaik Han (deceased) had two children, namely, the plaintiffs, that he was the sole beneficiary of the estate, and, (iii) failed, whether intentionally or unintentionally, to inform the court that the estate of the said Teoh Ee Tam had other beneficiaries, namely the plaintiffs.

As administrator of the estate of Teoh Ee Tam (deceased), Lee Chin Boh (deceased) was a bare trustee of the said land for other beneficiaries, namely, the plaintiffs. Lee Chin Boh (deceased) breached the said trust. The plaintiffs have been denied their beneficial entitlement to the said land. Lee Gaik Han died on 13 May 1941. Lee Chin Boh (deceased) died on 19 June 1992.

The plaintiffs seek the following relief:

(a) deklarasi bahawa plaintif-plaintif mempunyai kepentingan benefisial penuh ke atas setengah bahagian atau bahagian yang sama rata banyaknya (in equal share) dikenali sebagai Lot No. 437 (1), Mukim 19, Seberang Perai Tengah (sekarang dikenali sebagai Geran Pendaftaran No. 46203, Lot 907, Mukim 19, Daerah Seberang Perai Tengah) (selepas ini dikenali sebagai 'harta itu';

(b) bahawa defendan hendaklah melakukan apa-apa atau mengambil semua tindakan yang sesuai untuk memindah-milikan harta itu kepada nama plaintif-plaintif atau nomini mereka;

(c) sekiranya defendan gagal untuk memindah-milikan harta itu kepada nama plaintif-plaintif atau nomini mereka dalam masa sebulan dari perintah itu dibuat, Penolong Kanan Pendaftar, Mahkamah Tinggi Malaya di Pulau Pinang diarahkan dan diberi kuasa untuk menandatangani apa-apa dokumen yang perlu untuk memindah-milik harta itu kepada plaintif-plaintif;

(d) bahawa defendan adalah ditahan dan tidak dibenarkan untuk menguruskan atau melakukan sebarang transaksi atas harta itu sehingga pindah-milik harta itu kepada nama plaintif-plaintif atau nomini mereka diselesaikan;

(e) Perintah mahkamah melalui Saman Pemula No. 381 tahun 1978 yang bertarikh 9 October 1978 diketepikan dan pendaftaran perintah itu di Pendaftaran Hakmilik/Pejabat Tanah Daerah yang berkenaan dibatalkan dan tidak ada efek;

(f) Pendaftar/Pentadbir Tanah Daerah yang berkenaan hendaklah melakukan apa-apa yang sesuai untuk memberi efek kepada perintah ini;

(g) ganti-rugi plaintif-plaintif ditaksirkan dan dibayar oleh defendan dari harta pesaka Lee Chin Boh simati kepada plaintif-plaintif;

(h) Kos; dan

(i) relif yang lain dan selanjutnya yang dianggap sesuai dan suai-manfaat oleh mahkamah ini.

The defence now sought to be struck out may be paraphrased as follows: The defendant has no knowledge that the plaintiffs are beneficiaries of the estate of Teoh Ee Tam (deceased) and puts the plaintiffs to strict proof that they are beneficiaries. The defendant is the executor of the estate of Lee Chin Boh (deceased) who died on 19 June 1992. Teoh Ee Tam (deceased) was not the registered proprietor of the said land. Pursuant to order of court dated 9 October 1978, the said land was registered in the name of Lee Chin Boh (deceased). In 1963, Lee Chin Boh (deceased) applied and was granted letters

of administration of the estate of Teoh Ee Tam (deceased). In the petition for the said letters of administration, Lee Chin Boh (deceased) and Lee Gaik Lin were named as issue of Teoh Ee Tam (deceased). The plaintiffs are not beneficiaries of the estate of Lee Gaik Han (deceased) and have no beneficial interest in the said land. The defendant has no knowledge and denies the alleged fraudulent or wrongful acts of Lee Chin Boh (deceased). The defendant denies that the said Lee Chin Boh (deceased) was a trustee of the said land for the plaintiffs. The defendant, a grand-daughter of Lee Chin Boh (deceased), is the executor and trustee in the last will dated 15 June 1992 of Lee Chin Boh (deceased) and one of the beneficiaries of Lee Chin Boh (deceased). The said land is registered in the name of the defendant. All beneficiaries of the estate of Lee Chin Boh (deceased) who have no knowledge and deny the alleged fraud perpetrated by the said Lee Chin Boh (deceased) are *bona fide* beneficiaries of the estate of Lee Chin Boh (deceased). The plaintiffs are guilty of laches in bringing this action.

In a joint affidavit affirmed on 2 April 1997 and 16 April 1997, in support of the striking out application, the plaintiffs deposed to the matters pleaded in the statement of claim and exhibited the following documents:

(a) the 1st plaintiff's citizenship,

(b) the 2nd plaintiff's birth certificate, with Tay Tiaw Yeng and Cheah Kooi Im the parents,

(c) the death certificate of Teh Teow Yeang,

(d) the death certificate of Cheah Kooi Im,

(e) the grant of probate of to the estate of Lee Chin Boh (deceased), to the defendant,

(f) the document of title of the said land,

(g) 'bentuk daftar sementara',

(h) the 1st plaintiff's application for the entry of a private caveat against further dealings of the said land,

(i) the grant of letters of administration of an estate (Teoh Ee Tam), not fully administered, to Lee Chin Boh,

(j) Lee Chin Boh's Petition (Penang High Court 273 of 1963) for letters of administration *de bonis non* of the estate of Teoh Eee Tam (deceased),

(k) Penang High Court Originating Summons 381 of 1978,

(l) Order of Court dated 9 October 1978,

(m) Affidavit of Lee Chin Boh (deceased) affirmed on 13 June 1978.

In reply, the defendant affirmed, in her affidavit dated 28 May 1997, as follows. The plaintiffs' application is frivolous and wrong in law. By consent, on 9 February 1996, the plaintiffs and defendant were given leave to file, respectively, a statement of claim and defence. The plaintiffs have no right to make the present application which is contrary to that consent order. The plaintiffs' claim is founded on fraud and they cannot apply for summary judgment. The disputed facts must be resolved by a full trial.

In short, the plaintiffs' claim, on the basis of (alleged) consanguinity, a beneficial interest in the estate of Teoh Ee Tam (deceased) whilst the defendant refutes that the plaintiffs are issue of Lee Gaik Han, a daughter of Teoh Ee Tam (deceased).

Order 18 r. 19(1) (b - d) of the Rules of the High Court reads as follows:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleadings or in the indorsement, on the ground that –
>
> (b) it is scandalous, frivolous or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action, or
>
> (d) it is otherwise an abuse of the process of court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

But the court will only exercise its powers to strike out pleadings, under any of the four grounds in r. 19(1), in plain and obvious cases, a point repeatedly made by the court and in *Bandar Builder Sdn. Bhd. & Ors. v. UMBC* [1993] 4 CLJ 7; [1993] 3 MLJ 36, where the Supreme Court restated, (i) that the principle upon which the courts act in exercising its power under any of the four limbs in r. 19(1) is only in plain and obvious cases that recourse should be had to this summary process, (ii) that this summary process can only be adopted when it can clearly be seen that a claim or defence is on the face of it obviously unsustainable, and (iii) that that power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a course of action or defence. (On the latter, see also *Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 at 164.)

The ordinary dictionary meaning of the word "scandalous" is "shameful" or "disgraceful". A pleading stating a scandalous fact does not make that pleading scandalous, so long as it is relevant (*Millington v. Loring* [1881] 6 QBD 190) and is wholly necessary for the due prosecution of the action (*Re R, decd.*, [1950] 2 All ER 17). "The sole question (when considering whether a pleading is scandalous) is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading, which is material with reference to the relief prayed," per Selborne LC, in *Christie v. Christie* [1873] LR 8 Ch 499. But, if degrading charges be made, which are irrelevant, or if, though the charge be relevant, unnecessary details of a scandalous fact are given, the pleading becomes scandalous (*Blake v. Albion Assurance Society* [1876] 45 LJCP 663).

By "frivolous or vexatious" is meant a case which is obviously frivolous or vexatious, per Lindley LJ in *Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co.*, [1892] 3 CH 277. The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the court. " Per Jeune P., in *Young v. Holloway* [1895] P. 87 at 90.

Even though the court is disposed to give a liberal interpretation to the words "tend to prejudice, embarrass or delay the fair trial of the action" (*Berdan v. Greenwood* [1878] 3 Ex D 251), yet parties must not be too ready to find themselves embarrassed by the pleadings. For "the rule is not to dictate to parties how they should frame their case .... [But] parties must not offend against the rules of pleadings .... and if a party introduces a pleading which is unnecessary, and tends to prejudice, embarrass or delay the trial of the action, it then becomes a pleading which is beyond his right" (per Bowen LJ in *Knowles v. Roberts* [1888] 38 Ch D 263, 270).

A pleading is embarrassing if the defendant does not make it clear how much of the statement of claim he admits and how much he denies (*British and Colonial Association v. Foster* [1887] 4 TLR 574), if the plea of justification leaves the plaintiff in doubt what the defendant has justified and what he has not (*Flemingo v. Dollar* [1889] 23 QBD 388) and where a supplementary claim disclosed no cause of action (*Willoughby v. Eckstein* [1936] 1 All ER 650).

But mere prolixity is not of itself embarrassing. A pleading is not embarrassing merely because the other party declares that it is untrue (per Bramwell LJ in *Turquand v. Fearon* [1879] 40 LT 543, 544) or that the statement of claim embraces several causes of action, if they are distinctly pleaded. A claim for alternative relief (*Bagot v. Easton* [1877] 7 Ch D 1, 8) inconsistent defences (see *Re Morgan* [1904] 35 Ch D 492) or where the law stated or reasons alleged is bad (*London Corp v. Horner* [1914] 111 LT 512) is not embarrassing.

A statement will not be struck out merely because it is unnecessary, so long as it is harmless (per Chitty J in *Rock v. Pursell* [1887] 84 LTJ 45. But if wholly immaterial matter be set out in such a way that the applicant must plead to it and so raise irrelevant issues which may involve expense, trouble and delay, then the irrelevant matter will be struck out, as it will prejudice the fair trial of the action (see *Rassam v. Budge* [1893] 1 QB 571). A mass of evidence pleaded unnecessarily may be struck out (*Davy v. Garrett* [1878] 7 Ch D 473). Paragraphs which seek to re-try a previous action will be struck out (*United Telephone Co. Ltd v. Tasker* [1888] 59 LT 852).

Paragraph (1)(d) confers upon the court in express terms powers which the court has hitherto exercised under its inherent jurisdiction to prevent the improper use of its machinery. For the process of the court must be used *bona fide* and properly, and the court will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see *Castro v. Murray* [1875] 10 Ex 213). Examples of abuse are relitigation, an action for a collateral purpose, as where the intention was to embarrass the defendant (*Ansa Teknik (M) Sdn. Bhd. v. Cygal Sdn. Bhd.* [1989] 2 MLJ 423), a spurious claim, hopeless proceedings, a defence filed to delay and play for time (*Public Finance Bhd v. S Ramasamy* [1990] 2 CLJ 431) and where the parties had submitted themselves to the jurisdiction of the Syariah Court and seek to complain about the same matter in the High Court (*Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib* [1993] 1 CLJ 264; [1992] 2 MLJ 793).

Mr Chua Leng Poh submitted, for the plaintiffs, that this is a plain and obvious case for striking out under grounds (b - d). However, Mr Chua did not develop his arguments, other than the latter (bare?) assertion, on grounds (b - d). He contended that the defendant denied the plaintiffs' allegation of a breach of trust and fraud. The petition for the said letters of administration, he said, named more than one beneficiary. Yet, Lee Chin Boh (deceased) only named himself as the sole beneficiary in his application for distribution, and thereby "deprived" the plaintiffs of their beneficial interest. He further contended that the defendant had not specifically replied to the plaintiffs' allegation and that the defence, which did not, he said, condescend into particulars, was not "suitable", in view of the evidence adduced by the plaintiffs.

However, pointing to para. 5 of the defence, Mr Rumi Manecksha for the defendant refuted that the defence had not condescend into particulars or that a case had been made out under O. 18 r. 19(1)(b - d). He said that the allegations made only in 1996 against Lee Chin Boh (deceased) who died in 1992 should be tried.

Undoubtedly, the onus is upon the plaintiffs, as the applicants, to satisfy the court that this is a plain and obvious case for the striking out of the defence. The plaintiffs claim a beneficial interest in the estate of Teoh Ee Tam (deceased), whilst the defendant refutes the plaintiffs' claim that they are progeny of Lee Gaik Han (deceased), the daughter of Teoh Ee Tam (deceased). But how that defence is scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action, or how that defence is an abuse of the process of court were not spelt out or canvassed, in the submission of learned counsel or in the joint affidavit of the plaintiffs. Perhaps, it was better not canvassed, for it is evident, particularly so after the survey of the relevant authorities, that there is absolutely no case for striking out under grounds (b - d).

Instead, the plaintiffs attempted to persuade the court, and in the end that was all that the plaintiffs canvassed, that they are beneficiaries of the Estate of Lee Gaik Han (deceased) and that the defence, a denial of their beneficial interest, is not a reasonable defence. With respect, the striking out application was made on grounds (b - d) and not on ground (a). Nonetheless, even if the striking out application was made on ground (a) and even if affidavit evidence is admissible, which it is not, it still remains that a disputed fact cannot be tried on affidavits. Besides, the defence is not a mere denial, as the defendant disputing that the plaintiffs are beneficiaries of the Estate of Lee Gaik Han (deceased) can only frame her defence, accordingly, as a denial. How else of the asserted beneficial interest? And that defence is certainly not unarguable and therefore unreasonable, as the plaintiffs have not exhibited any independent evidence that they are indeed children of Lee Gaik Han (deceased) or that the said Teh Teow Yeang was the lawful husband of Lee Gaik Han (deceased). Rather, the documents that the plaintiffs so far exhibited suggest that the 2nd plaintiff is definitely not a child of Lee Gaik Han (deceased). Definitely, this is not a proper case, not even remotely so, for the striking out of the defence.

In the premises of the aforesaid, the plaintiffs' striking out application is dismissed with costs.